Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

27 February 2014*

(Common agricultural policy — Financing by the EAFRD — Support for rural development — Reduction or discontinuance of payments in the event of non-compliance with the rules on cross-compliance — Concept of intentional non-compliance)

In Case C-396/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 25 July 2012, received at the Court on 27 August 2012, in the proceedings

A. M. van der Ham,

A. H. van der Ham-Reijersen van Buuren

v

College van Gedeputeerde Staten van Zuid-Holland,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a judge of the Fourth Chamber, M. Safjan (Rapporteur), J. Malenovský and A. Prechal, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 September 2013,

after considering the observations submitted on behalf of:

— Mr van der Ham and Mrs van der Ham-Reijersen van Buuren, by C. Blokland and A. M. van der Ham,

— the Netherlands Government, by C. Schillemans, C. Wissels and B. Koopman, acting as Agents,

— the Estonian Government,, by M. Linntam, acting as Agent,

— the Slovenian Government, by N. Pintar Gosenca and A. Vran, acting as Agents,

— the European Commission, by A. Bouquet, G. von Rintelen and H. Kranenborg, acting as Agents,

* Language of the case: Dutch.

after hearing the Opinion of the Advocate General at the sitting on 24 October 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 67(1) of Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ 2004 L 141, p. 18), Article 51(4) of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1), and Article 23 of Commission Regulation (EC) No 1975/2006 of 7 December 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures (OJ 2006 L 368, p. 74).

2 The request has been made in proceedings between, on the one hand, Mr van der Ham and Mrs van der Ham-Reijersen van Buuren, and, on the other, the College van Gedeputeerde Staten van Hollande-Méridionale (Provincial Executive of the Province of South Holland, 'the Provincial Executive'), concerning the reduction of the aid which was granted to them under the common agricultural policy.

Legal context

EU law

Regulation No 1698/2005

3 Regulation No 1698/2005 was amended, inter alia, by Council Regulation (EC) No 74/2009 of 19 January 2009 (OJ 2009 L 30, p. 100). Under the second paragraph of Article 2 of Regulation No 74/2009, the amendments which it introduced apply from 1 January 2009, other than the amendments to Article 51(1), (2) and (4) of Regulation No 1698/2005, which apply from 1 January 2010.

4 According to recital 45 in the preamble to Regulation No 1698/2005:

'A penalty system should be set up where beneficiaries receiving payments under certain land management measures do not meet the mandatory requirements provided for in [Council] Regulation (EC) No 1782/2003 [of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1)] on all of their holding, taking into account the severity, extent, permanence and repetition of non-compliance.'

5 Article 36(a)(iv) of Regulation No 1698/2005 makes provision for agri-environment payments.

6 Article 51(1) and (4) of Regulation No 1698/2005, as applicable until 1 January 2010, provides that:

‘1. Where beneficiaries receiving payments under Article 36(a)(i) to (v) and Article 36(b)(i), (iv) and (v) … do not respect on the whole holding, as a result of an action or omission directly attributable to them, the mandatory requirements provided for in Articles 4 and 5 of and in Annexes III and IV to Regulation (EC) No 1782/2003, the total amount of their payments to be granted in the calendar year in which the non-compliance occurs shall be reduced or cancelled.

The reduction or cancellation referred to in the first subparagraph shall also apply in cases where the beneficiaries receiving payments under Article 36(a)(iv) do not respect on the whole holding, as a result of an action or omission directly attributable to them, the minimum requirements for fertiliser and plant protection product use referred to in Article 39(3).

…

4. Detailed rules for the reductions and exclusions shall be laid down in accordance with the procedure referred to in Article 90(2). In this context account shall be taken of the severity, extent, permanence and repetition of non-compliance.’

7 Article 51(4) of Regulation No 1698/2005, as amended by Regulation No 74/2009, applicable from 1 January 2010, states that:

‘Detailed rules for the reductions and exclusions shall be laid down in accordance with the procedure referred to in Article 90(2). In this context account shall be taken of the severity, extent, permanence and repetition of non-compliance found as well as of the following criteria:

(a) In the case of negligence, the percentage of reduction shall not exceed 5% and, in the case of repeated non-compliance, 15%.

…

(b) In case of intentional non-compliance, the percentage of reduction shall not in principle be less than 20% and may go as far as total exclusion from one or several aid schemes and apply for one or more calendar years.

…’

Regulation No 1975/2006

8 In the words of recital 6 in the preamble to Regulation No 1975/2006:

‘In accordance with Article 51 of Regulation (EC) No 1698/2005, payments under certain of the measures provided for in that Regulation have been made subject to the respect of cross-compliance as provided for in Chapter 1 of Title II of Regulation (EC) No 1782/2003. It is therefore appropriate to align the rules related to cross-compliance with those contained in Regulations (EC) No 1782/2003 and (EC) No 796/2004.’

9 Article 23 of Regulation No 1975/2006 is worded as follows:

‘Without prejudice to Article 51(2) of Regulation (EC) No 1698/2005, where a non-compliance is determined, a reduction shall be applied on the overall amount of aid … that has been, or has to be, granted to the beneficiary concerned following payment claims he has submitted or will submit in the course of the calendar year of the finding.

Where the non-compliance is due to negligence of the beneficiary, the reduction shall be calculated in accordance with the rules set out in Article 66 of Regulation (EC) No 796/2004.

In the case of intentional non-compliance, the reduction shall be calculated in accordance with Article 67 of Regulation (EC) No 796/2004.'

Regulation No 796/2004

10 In the words of recital 56 in the preamble to Regulation No 796/2004 laying down detailed rules for the implementation of sanctions in the event of non-compliance with rules related to cross-compliance:

'The system of reductions and exclusions envisaged in Regulation (EC) No 1782/2003 with regard to cross-compliance obligations however targets at a different aim, namely to set an incentive for farmers to respect the, already existing, legislation in the different fields of cross-compliance.'

11 Article 66(1) of Regulation No 796/2004, 'Application of reductions in the case of negligence', provides that:

'… [W]here a non-compliance determined results from the negligence of the farmer, a reduction shall be applied on the overall amount of direct payments … that has been, or has to be, granted to the farmer concerned following aid applications he has submitted or will still submit in the course of the calendar year of the finding. That reduction shall, as a general rule, be 3% of that overall amount.

However, the Paying Agency may, on the basis of the assessment provided by the competent control authority in the control report … decide either to reduce that percentage to 1% or to increase it to 5% of that overall amount …'

12 Article 67(1) of that regulation, 'Application of reductions and exclusions in cases of intentional non-compliance', states that:

'… [W]here the non-compliance determined has been committed intentionally by the farmer, the reduction to be applied to the overall amount [of direct payments] shall, as a general rule, be 20% of that overall amount.

However, the Paying Agency may, on the basis of the assessment provided by the competent control authority in the control report … decide to reduce that percentage to no less than 15% or, where appropriate, to increase that percentage to up to 100% of that overall amount.'

Regulation No 1782/2003

13 Regulation No 1782/2003 was repealed by Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003. Recital 2 in the preamble to Regulation 1782/2003 is worded as follows:

'The full payment of direct aid should be linked to compliance with rules relating to agricultural land, agricultural production and activity. Those rules should serve to incorporate in the common market organisations basic standards for the environment, food safety, animal health and welfare and good agricultural and environmental condition. If those basic standards are not met, Member States should withdraw direct aid in whole or in part on the basis of criteria which are proportionate, objective and graduated. ...'

Netherlands law

14 Article 2 of the Decree of the Minister for Agriculture, Nature and Food Quality No TRCJZ/2006/1978 on policy rules on the application of the rules on cross-compliance in connection with direct income support to farmers under the common agricultural policy (Regeling van de Minister van Landbouw, Natuur en Voedselkwaliteit, nr. TRCJZ/2006/1978, houdende beleidsregels over de toepassing van het normenkader randvoorwaarden in het kader van de directe inkomenssteun aan landbouwers in het kader van het Gemeenschappelijk landbouwbeleid) of 24 July 2006 ('the Decree') provides that:

'1. In case of conduct in breach of the obligations referred to in Article 3 of the Decree on the common agricultural policy — income support 2006, income support, barring force majeure … is to be reduced by a percentage which depends on:

— the assessment of an instance of non-compliance,

— the number of instances of non-compliance, and

— the policy area to which the cross-compliance requirements transgressed belong.

2. The assessment of an instance of non-compliance takes place on the basis of four criteria:

a. repetition;

b. extent;

c. severity;

d. permanence.

…'

15 Article 8 of the Decree states that:

'1. Each case of intentional non-compliance with a requirement or rule usually attracts a reduction of 20%.

2. The existence of intent is in any event to be assessed in the light of the following criteria:

a. in the description of the cross-compliance concerned, a direct connection is established with the intentional nature of the non-compliance;

b. the complexity of the cross-compliance concerned;

c. the question of whether a long-established, settled policy exists;

d. the question of whether there is active performance of an act or the deliberate omission of an act;

e. the fact that the farmer was previously informed of compliance deficiencies in respect of the cross-compliance requirement concerned;

f. the extent to which the cross-compliance requirement is not complied with.

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 The applicants in the main proceedings are proprietors of an agricultural holding in the Netherlands and the beneficiaries of income support and aid for environmentally-friendly farm management under Regulation 1698/2005.

17 On 13 March 2009, the Algemene Inspectiedienst (General Inspection Service) of the Ministerie van Economische Zaken, Landbouw en Innovatie (Ministry of Economic Affairs, Agriculture and Innovation) carried out an inspection on the Van der Ham holding to assess compliance with the cross-compliance requirements of the common agricultural policy. It was determined, in the course of that inspection, that manure had not been spread in a manner which was low in emissions, as required by a provision of national legislation.

18 The manure had been spread on the plot of grassland concerned on the instructions of the applicants in the main proceedings by an agricultural contractor employed by an agricultural firm.

19 On the basis of that finding, on 29 July 2010, the Provincial Executive adopted a decision reducing by 20%, on the ground of intentional non-compliance with that national legislation, the subsidy for environmentally-friendly farm management which the applicants in the main proceedings had received. The non-compliance by the agricultural contractor with the obligation to spread manure in a manner which was low in emissions was attributed to them.

20 The applicants in the main proceedings lodged an objection against that decision, which was dismissed by the Provincial Executive by decision of 2 December 2010 on the ground that the obligation to spread manure in a manner which is low in emissions is a long-established, settled policy within the meaning of Article 8(2)(c) of the Decree.

21 Since the action brought by the applicants in the main proceedings before the Rechtbank 's-Gravenhage (District Court, The Hague) was dismissed, they appealed to the referring court.

22 In those circumstances the Raad van State (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. How should the term “intentional non-compliance” in Article 51[4] of … Regulation … No 1698/2005 …, as amended by … Regulation … No 74/2009 …, in Article 23 of … Regulation … No 1975/2006 … and in Article 67(1) of … Regulation … No 796/2004 … be understood? In order to assume that intentional non-compliance has occurred, is it sufficient that there is non-compliance with a long-established, settled policy within the meaning of Article 8(2)(c) of [the Decree]?

2. Does EU law preclude a ruling in a Member State that there is “intentional” non-compliance with a scheme, within the terms of those regulations, simply because one or more of the following circumstances obtained:

(a) intent has already been assumed in the cross-compliance requirement in respect of which there has been non-compliance;

(b) the cross-compliance requirement concerned is complex;

(c) long-established, settled policy exists;

(d) there has been an active performance of an act, or a deliberate omission of an act;

(e) the farmer was previously informed of compliance deficiencies in respect of the cross-compliance requirement concerned;

(f) the extent to which cross-compliance is not complied with is such that intent can be assumed?

3. Can "intentional non-compliance" be attributed to the beneficiary of the aid if a third party carries out the works on his instructions?'

Consideration of the questions referred

The first and second questions

23 First of all, it must be noted, as the Advocate General has done at point 25 of her Opinion, that Article 51 of Regulation No 1698/2005 is applicable to the dispute in the main proceedings in the version before it was amended by Regulation No 74/2009, in which the concept of 'intentional non-compliance' does not appear.

24 Furthermore, as inter alia the Slovenian Government has noted in its observations, it is apparent from the order for reference that the contested decision is based on infringement of the obligation to spread manure in a manner which is low in emissions, which constitutes a long-established, settled policy within the meaning of Article 8(2)(c) of the Decree.

25 The referring court also states that, in the context of the dispute before it, it has to examine whether the Rechtbank 's-Gravenhage correctly found that the Provincial Executive did not err in finding that the circumstance that that obligation is a 'long-established, settled policy' by itself leads to the conclusion that the non-compliance with the rules on cross-compliance is 'intentional', even if a third party carries out work on the instructions of the farmer.

26 Accordingly, the first and second questions must be construed as meaning that the referring court asks, in essence, how the concept of 'intentional non-compliance' within the meaning of Article 67(1) of Regulation No 796/2004 and Article 23 of Regulation No 1975/2006, should be interpreted and whether EU law precludes a national provision, such as that at issue in the main proceedings, which gives a high probative value to the criterion of the existence of a long-established, settled policy.

The concept of 'intentional non-compliance'

27 The referring court, asks, in essence, how to interpret the concept of 'intentional non-compliance' within the meaning of Article 67(1) of Regulation No 796/2004 and Article 23 of Regulation No 1975/2006.

28 It must be borne in mind at the outset that in the context of the reform of the common agricultural policy established by Regulation No 1782/2003, for which Regulation No 796/2004 sets out certain rules of application, direct payments were, as indicated in recital 2 in the preamble to Regulation No 1782/2003, linked to compliance with the rules on cross-compliance. It is apparent from Article 51(1) of Regulation No 1698/2005 that that interdependence was also introduced in the context of the European Agricultural Fund for Rural Development (EAFRD).

29 As regards the penalties which may be imposed for non-compliance determined, it emerges from Article 51(1) of Regulation No 1698/2005 and Article 23 of Regulation No 1975/2006 that an infringement of the rules on cross-compliance gives rise to the reductions which are calculated in accordance with Articles 66 and 67 of Regulation No 796/2004.

30 Furthermore, it follows from Article 23 of Regulation No 1975/2006 that the penalties in the case of infringement of the cross-compliance requirements are applied in the event of negligence or intentional non-compliance. The nature of the liability regime laid down by that regulation is therefore not strict.

31 Neither Article 67 of Regulation No 796/2004 nor Article 23 of Regulation No 1975/2006 defines the concept of 'intentional non-compliance'. Such a definition also does not follow from the other provisions of those regulations, which, in addition, do not refer to the law of the Member States.

32 Therefore, in accordance with settled case-law, that concept must be given an independent and uniform interpretation, having regard to the usual meaning of those words, the context of those articles and the objective pursued by the legislation of which they are part (see, inter alia, Case C-420/11 *Leth* [2013] ECR, paragraph 24 and the case-law cited).

33 Article 67(1) of Regulation No 796/2004 and Article 23 of Regulation No 1975/2006 cover cases of non-compliance, respectively, that has been committed intentionally or is intentional non-compliance.

34 Intentional infringement of the rules on cross-compliance is based, first, on an objective factor, namely breach of those rules, and, second, on a subjective factor.

35 In respect of the second factor, the beneficiary of the aid may engage in particular conduct either with the aim of bringing about a situation of non-compliance with the rules on cross-compliance, or not seeking such an objective but accepting the possibility that non-compliance may result.

36 As regards the context of the concept of non-compliance 'committed intentionally', it must be noted that the EU legislature provides, in particular in Article 67(1) of Regulation No 796/2004, for the possibility both of an increase and of a reduction of the penalties laid down for non-compliance committed intentionally. Therefore, that provision encompasses a certain degree of diversity of non-compliance committed intentionally by a beneficiary of aid.

37 Consequently, the concept of 'intentional non-compliance' within the meaning of Article 67(1) of Regulation No 796/2004 and Article 23 of Regulation No 1975/2006 must be interpreted as meaning that it presupposes an infringement of the rules on cross-compliance by a beneficiary of aid who seeks a state of non-compliance with those rules or who, without seeking such a state, accepts the possibility that it may occur.

The criterion of the existence of a long-established, settled policy

38 The referring court asks whether EU law precludes a national provision, such as that at issue in the main proceedings, which gives a high probative value to the criterion of the existence of a long-established, settled policy.

39 It must be observed that neither Regulation No 796/2004 nor Regulation No 1975/2006 lays down methods for taking evidence to establish that non-compliance with the requirements of cross-compliance was intentional.

40 It follows that it is for national law to set the criteria for those methods. Therefore, the Member States have the option of laying down provisions to establish the intentional nature of an infringement of the rules on cross-compliance.

41 However, where a Member State introduces a provision which, like that at issue in the main proceedings, establishes as such a criterion the existence of a long-established, settled policy and which gives a high probative value to that criterion, that State must nevertheless make it possible for the beneficiary of aid to adduce evidence of the lack of intent in his conduct.

42 Having regard to all the foregoing, the answer to the first and second questions must be that the concept of 'intentional non-compliance' within the meaning of Article 67(1) of Regulation No 796/2004 and Article 23 of Regulation No 1975/2006 must be interpreted as requiring an infringement of the rules on cross-compliance by a beneficiary of aid who seeks a state of non-compliance with those rules or who, without seeking such a state, accepts the possibility that it may occur. EU law does not preclude a national provision which, like that at issue in the main proceedings, gives a high probative value to the criterion of the existence of a long-established, settled policy, in so far as the beneficiary of aid has the possibility if appropriate of adducing evidence of the lack of intent in his conduct.

The third question

43 By its third question, the referring court asks, in essence, whether Article 67(1) of Regulation No 796/2004 and Article 23 of Regulation No 1975/2006 must be interpreted as meaning that in the event of an infringement of the requirements of cross-compliance by a third party who carries out work on the instructions of a beneficiary of aid, the conduct of that third party may be attributed to that beneficiary.

44 As the Advocate General has observed in point 58 of her Opinion, the system of penalties was laid down, as is apparent from recital 45 in the preamble to Regulation No 1698/2005, to penalise beneficiaries of aid if they do not meet, on all of their holding, the mandatory requirements of cross-compliance provided for in Regulation No 1782/2003.

45 Under Article 23 of Regulation No 1975/2006, penalties are to be applied only in the case of infringement of the cross-compliance requirements by negligence or intentional non-compliance.

46 Nevertheless, as the Advocate General noted in point 61 of her Opinion, the EU legislature wanted the make the beneficiary of aid responsible both for his own acts or omissions and those of third parties.

47 The question therefore arises of the criteria according to which beneficiary of aid may be held responsible for the act or omission of a third party who caused the non-compliance with the rules on cross-compliance.

48 It must be stated that that responsibility falls within the rules on liability for that beneficiary's own act or omission.

49 Consequently, to hold a beneficiary of aid responsible for an act or omission of a third party who carried out work on his plot on his behalf, it is necessary that the conduct of that beneficiary is intentional or negligent.

50 In such a case, even if the beneficiary of aid's own conduct is not directly the cause of that non-compliance, it may be the cause through the choice of the third party, the monitoring of the third party or the instructions given to the third party.

51 Moreover, the responsibility of a beneficiary of aid for his negligence or his intentional conduct may be established independently of the intentional or negligent nature of the conduct of the third party who was the cause of the non-compliance with the rules on cross-compliance.

52 That interpretation is consistent with the objective of penalties for infringement of the rules on cross-compliance which seek to incentivise farmers to observe the existing legislation in the various fields of cross-compliance. First, the requirement that there must be intentional or negligent conduct by a beneficiary of aid for him to be held responsible for acts or omissions of third parties enables the incentive effect of those penalties, referred to in recital 56 in the preamble to Regulation No 796/2004, to be maintained. Second such an interpretation enables abuse to be prevented, since the beneficiary of aid cannot exculpate himself by sub-contracting the agricultural work on his plot, nor diminish his liability by adducing evidence that the third party concerned, for example, acted negligently in order to exclude his liability for non-compliance committed intentionally.

53 Consequently, the answer to the third question is that Article 67(1) of Regulation No 796/2004 and Article 23 of Regulation No 1975/2006 must be interpreted as meaning that, in the event of an infringement of the requirements of cross-compliance by a third party who carries out work on the instructions of a beneficiary of aid, the beneficiary may be held responsible for the infringement if he acted intentionally or negligently as a result of the choice or the monitoring of the third party or the instructions given to him, independently of the intentional or negligent nature of the conduct of the third party.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **The concept of 'intentional non-compliance' within the meaning of Article 67(1) of Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and Article 23 of Commission Regulation (EC) No 1975/2006 of 7 December 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures, must be interpreted as requiring an infringement of the rules on cross-compliance by a beneficiary of aid who seeks a state of non-compliance with those rules or who, without seeking such a state, accepts the possibility that it may occur. European Union law does not preclude a national provision which, like that at issue in the main proceedings, gives a high probative value to the criterion of the existence of a long-established, settled policy, in so far as the beneficiary of aid has the possibility if appropriate of adducing evidence of the lack of intent in his conduct.**

2. **Article 67(1) of Regulation No 796/2004 and Article 23 of Regulation No 1975/2006 must be interpreted as meaning that, in the event of an infringement of the requirements of cross-compliance by a third party who carries out work on the instructions of a beneficiary of aid, the beneficiary may be held responsible for the infringement if he acted intentionally or negligently as a result of the choice or the monitoring of the third party or the instructions given to him, independently of the intentional or negligent nature of the conduct of the third party.**

[Signatures]